Supreme Court, U.S.
FILED

(2)

03 - 92 JUL 7 - 2003

No. _____

# In the Supreme Court of the United States

Patrick M. Hays,

*Petitioner,*

vs.

Luverne Hoffman, et al.,

*Respondents,*

and

United States of America,

*Intervenor.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Brian Wojtalewicz
*Counsel of Record*
139 North Miles, Box 123
Appleton, MN 56208-0123
(320) 289-2363

*Attorney for Petitioner*

Filed July, 2003

2003 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

8pp

TABLE OF CONTENTS

Page

APPENDIX J: Report and Recommendation of Chief Magistrate Judge, dated April 26, 2001 ..... J-1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Patrick M. Hays, et al.,

Plaintiffs,

v.

Luverne Hoffman, et al.,

Defendants.

Civil. 97-1656 JMR/FLN

**REPORT AND RECOMMENDATION**

---

Brian E. Wojtalewicz, Esq., for Plaintiffs.
Joan Humes, Assistant United States Attorney, for the Government. Janet Newberg, Esq., for Defendants.

---

**THIS MATTER** came for a hearing before the undersigned United States Magistrate Judge on March 9, 2001, for resolution of a post-trial issue concerning the number of false claims submitted by Defendants to the Government.

## I. BACKGROUND

The Jury returned a verdict finding Defendants liable for violations of the False Claims Act, 31 U.S.C. §§ 3729-3733, as to 11 of the 12 different false claim schemes on the verdict form. (See Defendants' Mem. Concerning False Claims at 1("Defs.' Mem.")). However, the Jury also found that the Government suffered no actual loss. (Id.). The task

before this Court is to determine the exact number of false claims submitted by Defendants to the Government.

## II. CONCLUSIONS OF LAW

### A. Standard of Review

Congress passed the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and its *qui tam* action to prevent and prosecute massive frauds perpetrated by large defense contractors during the Civil war, See United States v. Bornstein, et al., 423 U.S. 303, 308 (1976). The FCA allows private litigants to bring actions on behalf of the Government against anyone who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government[.]

31 U.S.C. § 3729(a); see also Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (1999). For purposes of this section, "knowingly" is defined such that "no proof of specific intent to defraud is required," and means that the Defendant: "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b),

Damages under the FCA are two-fold, a civil penalty between $5,000 and $10,000, together with treble actual damages. See 31 U.S.C. § 3729(a)(7). Accordingly, to recover under the FCA, Plaintiffs must prove by a preponderance of the evidence that; (1) Defendants presented false claims for payment to the Government; and (2) Defendants, at the time the claims were submitted, knew that the information submitted in the claims was false, or acted in deliberate ignorance of the truth or falsity of the information submitted in the claims. See 31 U.S.C. § 3729(a) and (b).

**B. Legal Analysis**

In the instant case, the Jury found that Defendants violated the FCA by committing 11 different false claim schemes. Upon determining that Defendants violated the FCA, the Court had to determine the extent of their monetary liability. As noted above, the FCA provides for treble actual damages. Since the Jury found that the Government sustained no measurable damages, the Court was unable to award actual damages.

The second remedy available to the Government under the FCA is the $5,000.00 to $10,000.00 civil penalty per false claim. As a preliminary matter, it is important to note that this Court lacks the discretion or inherent power to impose penalties below the range set forth in the FCA. See U.S. v. Killough, 848 F.2d 1523 (11th Cir. 1988). Furthermore, civil penalties are recoverable under the FCA even in situations such as the one at bar where Plaintiffs have failed to show actual damages. See U.S. ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) (citing Rex Trailer Co. v. U.S., 350 U.S. 148, 153 n. 5, (1956)).

As noted earlier, this Court mast determine the exact number of false claims submitted by Defendants for payment

by the Government. Plaintiffs contend that the 11 false claim schemes produced false claim reports that appeared on 28 cost reports, and subsequently led to 336 monthly payment requests or claims (28 annual cost reports multiplied by 12 monthly payment requests). At the other extreme, Defendants argue that at most, 50 false claims are represented by the Jury's verdict. Specifically, Defendants believe that the claims, for the purpose of measuring penalties, are either the central office allocations (for those expenses allocated through the central office) or the cost reports (for those expenses directly identified to a specific facility). Defendants also contend that the imposition of civil penalties in this case would violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.[1]

The FCA states that a claim includes any "request or demand...for money or property" where the Government provides any portion of the money or property requested. See 31 U.S.C. § 3729(c); see also Westinghouse Savannah River Co., 176 F.3d at 785. In other words, there must be a call upon the Government fisc and the Court's focus must be upon the specific conduct of the person from whom the Government seeks to collect the penalty. See Bornstein et al., 423 U.S. at 309-10. Under the FCA, each knowingly false "claim for payment" constitutes a separate violation. See 31 U.S.C. § 3729(c).

---

[1] As the order referring this issue to the Magistrate Judge says only that the matter is referred for Report and Recommend "on the number of false claims submitted by defendants to the government," this Court offers no opinion as to whether the civil penalties at issue would violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

In the present case, plaintiffs expert witness, Robert Rau, provided uncontroverted testimony at trial concerning the number of monthly payment requests or claims submitted by Defendants. Specifically, Mr. Rau testified that the falsely claimed expenses of the 12 different schemes were each within a certain number of the 29 cost reports filed for each of Defendants' group homes and subsequently, within a certain number of the monthly payment requests for Medicaid submitted by Defendants between 1994 and 1995. Additionally, both parties' arguments at the March 9, 2001, hearing revealed that the monthly payment requests triggered payment by the Government.[2]

Consequently, this Court concludes that the submission of a payment request was the act which caused the false claims relating to these schemes to be presented to and paid by the Government. These payment requests were in fact the "request or demand" on the Government fist. Accordingly, because the payment requests were made each month between 1994 and 1995 for each of the 28 cost reports and each false claim for payment constitutes a separate FCA violation, the request or demand for payment on the false expense claims was made to the Government 336 times (28 annual cost reports multiplied by 12 monthly payment requests).

---

[2] The manner in which nursing homes are reimbursed by the Medicaid system begins with the submission of an annual cost report to the Minnesota Department of Human Services ("DHS"). The DHS then takes the information in that cost report and sets a rate, per patient, per month, that it will pay the facilities. Once the facilities are notified of the new rate, they submit a payment request on a monthly basis.

## III. RECOMMENDATION

Based upon all the files, records and proceedings herein, **IT IS HEREBY RECOMMENDED** that Defendants be held liable for knowingly presenting 336 false claims for payment or approval to the Government in violation of the False Claims Act.

Dated: April 26, 2001

s/FRANKLIN L. NOEL
Chief Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court and serving on all parties, within ten days of service of this Report and Recommendation, written objections which specifically identify the portions of the proposed findings, recommendations or report to which objection is being made, and a brief in support thereof. A party may respond to the objecting party's brief within ten days after service of the objections. All briefs filed under this rule shall be limited to ten pages. A judge shall make a de novo determination of those portions to which objection is made.

This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore not appealable to the Circuit Court of Appeals.